Supreme Court, U.S.
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No.

In the Supreme Court of the United States

DARYOUSH RAHSEPARIAN, A/K/A STEVE RAHSEPARIAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the rule in *Bruton* v. *United States*, 391 U.S. 123 (1968), applies to inferentially incriminating statements by a non-testifying co-defendant when those statements explicitly name the defendant and add substantial weight to the prosecution's case on a key element of proof.

RULE 14.1(b) STATEMENT

The following were the parties to the proceeding in the Court of Appeals for the Tenth Circuit:

1. Steve Rahseparian, defendant-appellant;
2. Ardie Rahseperian, defendant-appellant;
3. and the United States of America, plaintiff-appellee.

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PETITION FOR A WRIT OF CERTIORARI

Steve Rahseparian respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion (App., *infra*, 1a-20a) is reported at 231 F.3d 1267 (10th Cir. 2000). The order of the court of appeals denying rehearing (App., *infra*, 26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 2000. App., *infra*, 1a-20a. A timely petition for rehearing was denied on December 21, 2000. App., *infra*, 26a. A petition for stay of the mandate pending the filing and disposition of a certiorari petition was granted on January 2, 2001. App., *infra*, 21a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

STATEMENT

In *Bruton* v. *United States*, 391 U.S. 123 (1968), this Court held that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of the failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.* at 135. "Such a context," the Court decided, "is presented here, where the powerfully incriminating extra-judicial statements of a co-defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect * * *. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination." *Id.* at 135-36.

In the years since *Bruton* was decided, this Court and others have repeatedly sought to determine precisely which "extra-judicial statements of a co-defendant" are sufficiently "powerfully incriminating" that limiting instructions are not enough to shield the defendant from prejudice. In *Richardson* v. *Marsh*, 481 U.S. 200 (1987), the Court held that where the statement at issue is so completely redacted as not even to refer to the defendant, it does not fall within *Bruton*. More recently, in *Gray* v. *Maryland*, 523 U.S. 185 (1998), the Court held that an otherwise "powerfully incriminating" statement does not lose its prejudicial impact merely because the prosecution substitutes a neutral pronoun or symbol for the defendant's name.

But the courts of appeals remain divided on the question presented in this case: Whether, and if so under what circumstances, a non-testifying co-defendant's hearsay statement that explicitly names the defendant, but whose content incriminates the defendant only by virtue of inferences to be drawn from surrounding evidence, falls within *Bruton*. This Court's decision in *Gray* suggested that some inferences

are so "obvious" (523 U.S. at 196) that *Bruton* remains applicable; yet in the wake of *Gray*, the circuits remain in disagreement about when, if ever, an inferentially incriminating statement may run afoul of the rule in *Bruton*. The court below, joining the D.C. Circuit, concluded that statements whose content is "only inferentially incriminating" do not fall within *Bruton* at all. The Fifth and Eleventh Circuits, by contrast, take a more nuanced view — flatly rejecting the proposition that "inferentially incriminating" statements can ***never*** be precluded by *Bruton*, and asking instead whether the inference at issue is "direct" (in which case *Bruton* applies) or is "several inferential jumps" away (*United States* v. *Lage*, 183 F.3d 374, 388 (5th Cir. 1999)) (in which case *Bruton* does not apply).

This case provides an ideal vehicle to resolve this important and recurring issue. Over petitioner's vehement objection — and despite a warning beforehand from the trial judge — the government elicited from a federal agent postarrest statements made by petitioner's own brother, accusing petitioner of directing him to make the allegedly fraudulent phone calls, and characterizing petitioner as untrustworthy. The court of appeals nevertheless held that the challenged statements were "'outside the scope of *Bruton's* rule'" (App., *infra*, 19a) because they were "only inferentially incriminating." *Id.* at 18a. That conclusion is at odds with this Court's cases and draws a wholly untenable distinction between "facially" and merely "inferentially" incriminating statements. Further review is warranted.

1. On April 22, 1998, a federal grand jury in the Western District of Oklahoma indicted Steve and Ardie Rahseparian, and their father Jack, on thirteen counts of conspiracy in violation of 18 U.S.C. § 371, mail fraud in violation of 18 U.S.C. §§ 1341 and 2, and money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i) and 2. The government alleged that the three defendants had engaged in a telemarketing scheme designed to obtain money from customers in return for merchandise of modest value and prizes that were never

delivered. App., *infra*, 2a All three defendants were jointly tried before a jury.

The evidence at trial was close and hotly contested; indeed, the court below found the evidence legally insufficient against Jack Rahseparian and therefore vacated his convictions. *United States* v. *Rahseparian*, 231 F.3d 1257, 1264 (10th Cir. 2000). As to petitioner, the trial turned heavily on the question whether Steve Rahseparian had formed the requisite intent to commit the charged offenses. A key to the government's proof on this element was the testimony of Special Agent Sharon Morissette, who testified about her 1996 interrogation of Steve's brother and co-defendant, Ardie Rahseparian, at Ardie's Chicago apartment. During the examination of Morissette, the prosecutor — despite her assurances that she would not elicit testimony in violation of *Bruton* v. *United States*, 391 U.S. 123 (1968) — induced the agent to state that Ardie Rahseparian had made two separate out-of-court statements incriminating Steve Rahseparian, both in direct violation of *Bruton* (statements indicated in bold):

Q: [MRS. POARCH]

[D]id you ask [Ardie Rahseparian] about Genesis Marketing?

A: [AGENT MORISSETTE] Yes.

Q: And what did he tell you?

A: He told me that he was employed as a sales rep for Genesis Marketing for a period of time.

Q: And did he tell you about — anything about the initiation of it or the start-up of it?

A: Yes, he did.

Q: What was that?

A: He said that he had been asked to make phone calls — to make sales calls for the company by his brother Steve.

Q: And did he express that before the start-up that he expressed any hesitation?

A: Yes. He said that he was reluctant to get involved.

Q: And why was that?

A: He said that he didn't trust his brother.

App., *infra*, 22a-25a.

Sustaining defense counsel's objection, the trial court ruled that the "whole colloquy" — including the two objectionable statements — was a "very, very clear case" of *Bruton* error. *Id.* at 25a. But rather than declare a mistrial, the trial court simply instructed the jury to disregard the testimony (the very remedy that this Court in *Bruton* held could *not* suffice to purge the error).

2. The court of appeals affirmed. App., *infra*, 21a. The court did not dispute that the challenged statements touched upon the "key issues in the case" — in particular, whether Steve "is the type of person who would have the intent to commit fraud and launder money." *Id.* at 18a. The court concluded, however, that Ardie Rahseparian's statements — as conveyed by Agent Morissette — were not ones "to which the narrow *Bruton* rule applies." *Id.* In the court's view, Ardie's statements were "only inferentially incriminating" (*id.*), and were therefore "'outside the scope of Bruton's rule.'" (*id.* at 19a) (quoting *Gray* v. *Maryland*, 523 U.S. 185, 195 (1998)). Relying on *Gray* and *Richardson* v. *Marsh*, 481 U.S. 200 (1987), the court of appeals held that the trial court's instructions — which directed the jury to disregard the statements — had "cured any possible prejudice." (*id.* at 19a-20a).

REASONS FOR GRANTING THE WRIT

The Tenth Circuit held in this case that an extra-judicial statement that is "only inferentially incriminating," App., *infra*, 18a — *i.e.*, whose incriminating force requires drawing inferences from the statement — ***never*** triggers *Bruton* protection. Although that narrow view of *Bruton* is shared by the D.C. Circuit, it is in conflict with decisions of the Fifth and Eleventh Circuits. The court of appeals' decision also is inconsistent with this Court's case law (on which the Tenth Circuit purported to rely).

What is more, the decision below takes an implausibly narrow view of a defendant's rights under the Confrontation Clause. In the court of appeals' view, *Bruton* extends only to statements that on their face are tantamount to full-blown confessions, *i.e.*, statements that are so damaging and so all-encompassing as to constitute proof of the defendant's guilt beyond a reasonable doubt if believed by a jury. But incriminating statements by co-defendants actually come in shades of gray. At one end of the spectrum are statements like those specifically excluded in *Bruton* and *Gray* v. *Maryland*, 523 U.S. 185 (1998); such statements both name the defendant and, without recourse to any inferences at all, establish that he committed the crime. See, *e.g.*, *Bruton*, 391 U.S. at 124; *Gray*, 523 U.S. at 195. At the opposite end of the spectrum are statements that plainly fall outside the scope of *Bruton*, such as the statement at issue in *Richardson* v. *Marsh*, 381 U.S. 200 (1987); such statements do not name the defendant at all, much less prove any participation by the defendant in the offense. This case, however, presents for resolution a question not resolved by this Court's *Bruton* case law: Whether (and, if so, under what circumstances) statements like the extra-judicial comments by the co-defendant in this case — that are not tantamount to a confession but that explicitly name the defendant and substantially assist the government, through simple inferences, in proving a hotly contested element of its case — are covered by *Bruton*. The Tenth Circuit held in

substance that statements that do not facially inculpate the defendant on all elements of the crime — but instead incriminate him on one or more elements by an inference — are outside the scope of the rule in *Bruton*.

That cannot be correct. Where, as here, the inferential step required to view the statement as highly inculpatory is so small as to be no step at all, and the prejudicial impact is severe, the constitutional protections undergirding *Bruton* are no less implicated. Especially because *Bruton* challenges are commonplace in both federal and state courts, further review is clearly warranted.

A. The Tenth Circuit's Decision Deepens A Conflict Among The Circuits

This Court has not had occasion to address whether the rule in *Bruton* v. *United States*, 391 U.S. 123 (1968), applies to an extra-judicial statement by a co-defendant that explicitly names the defendant and adds substantial weight to the government's case on a key element of proof, but only on the basis of inferences drawn from the statement.[1] The circuits, however, are deeply divided on this exact question. See Benjamin E. Rosenberg, *The Future of Codefendant Confessions*, 30 Seton Hall L. Rev. 516, 528-29 (2000) (describing confusion among the circuit courts on this aspect of the rule in *Bruton*).

The question presented in the petition is a natural outgrowth of the question on which this Court granted

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[1] Neither of the two decisions by this Court cited in the Tenth Circuit's opinion addressed the question whether highly inculpatory statements by a co-defendant amounting to something short of a full-blown confession nonetheless triggers *Bruton* protection. The statement in *Richardson* v. *Marsh*, 481 U.S. 200 (1987), did not even refer to the defendant by name, much less implicate him in any criminal activity. See *id.* at 202. And the partially redacted statement in *Gray* v. *Maryland*, 523 U.S. 185 (1998), which substituted a neutral pronoun or symbol for the defendant's name, was found to be the functional equivalent of the statement in *Bruton*, which actually named the defendant as having committed the crime. See *id.* at 194.

certiorari in *Gray*. In *Gray*, this Court granted certiorari to decide whether the rule in *Bruton* applies to a statement that directly incriminates the co-defendant, but because of redaction an inference must be drawn about the ***identity*** of the ***defendant***. The *Gray* Court answered that question in the affirmative. In this case, the question of inference applies not to the identity of the defendant but rather to the ***content*** of the ***statement itself***. Some circuits have held that *Gray's* extension of *Bruton* to inferences is not limited solely to the identity of the defendant but also includes statements whose content incriminates by inference. The Tenth Circuit (in this case) and another court of appeals have rejected this view, finding *Bruton* inapplicable to such inferentially incriminating declarations. This Court should grant certiorari to resolve this circuit conflict.

As noted above, the Tenth Circuit in this case held that the rule in *Bruton* is inapplicable to co-defendants' statements that are "only inferentially incriminating." App., *infra*, 18a. The D.C. Circuit has taken a similarly narrow view.

In *United States* v. *Wilson*, 160 F.3d 732 (D.C. Cir. 1998), the court of appeals held that a co-defendant's statement that explicitly "named" the defendant and helped prove the government's case was "not the sort of statement under *Bruton* or *Gray* that would require * * * exclusion." *Id.* at 740 n.5. Like the Tenth Circuit in the present case, the D.C. Circuit held that "statements that incriminate only inferentially are outside the scope of *Bruton*." *Id.* The court reasoned that, although the statement strongly inculpated the defendant, it did not do so "'facially'" but "only when linked with other evidence at trial." *Id.*

By contrast, the Fifth Circuit has held that, in the wake of *Gray*, *Bruton* extends even to statements whose incriminating ***content*** (as opposed to merely the ***identity*** of the defendant) depends on drawing some inferences from surrounding evidence. In *United States* v. *Lage*, 183 F.3d 374 (5th Cir. 1999), the court considered a postarrest statement in which a non-testifying co-defendant had placed the defendant at the

scene of the crime at approximately the time of the offense, and stated further that the defendant had jumped on top of him just before the police arrived. Although both statements took on their inculpatory meaning from context — and neither was "facially" incriminating — the Fifth Circuit did not simply reject defendant's *Bruton* claim out of hand (as the Tenth Circuit would have done). To the contrary, the court recognized that at least "some inferentially incriminating statements" implicate *Bruton*. *Id.* at 388; see *id.* (*Bruton* requires a court to examine the degree to which the "content of the statement" incriminates by inference). The court adopted a nuanced approach to the issue, asking whether the statement at issue provided a "direct" link to the defendant (even if through inference) or instead would require "the jury [to] make[] several inferential jumps." *Id.* Applying that principle, the court found that one of the statements at issue — the one alleging defendant's evasive actions at the time the police arrived — "present[ed] a * * * difficult question" under *Bruton*. *Id.* The court therefore turned to a "harmless error analysis" (*id.*) — the very analysis pretermitted by the Tenth Circuit's approach to the issue.

The Eleventh Circuit has sided with the Fifth Circuit. In *United States* v. *Doherty*, 233 F.3d 1275 (11th Cir. 2000), the government introduced out-of-court statements by the co-defendant that, like the statements in this case, did not, on their own, demonstrate the defendant's guilt, but nonetheless served as powerful evidence of the defendant's criminal intent. *Id.* at 1279. On appeal, the government made exactly the same argument it did in this case, namely that application of the *Bruton* rule requires a "clear confession" which, on its face, if believed by a jury, would constitute proof of the defendant's guilt beyond a reasonable doubt. *Id.* But the Eleventh Circuit in *Doherty* firmly rejected this argument, concluding that *Bruton* was implicated because the challenged statements "named" the defendant and "linked him to the transactions at issue." *Id.* at 1282.

This case is an ideal vehicle for resolving the conflict. Ardie Rahseparian's extra-judicial statements — adduced through the hearsay testimony of Agent Morissette — named petitioner explicitly and, although only inferentially incriminating, were absolutely devastating. Through the statements, petitioner's co-defendant (his brother) accused petitioner of directing him to engage in the allegedly illegal telemarketing scheme and stated that he was suspicious of petitioner's request because he regarded his brother as untrustworthy. In a mail fraud and conspiracy case — where state of mind is so central — what could be more damning than statements indicating that the defendant was the mastermind of the unlawful scheme and that petitioner's brother believed he had a criminal predisposition? Yet by the Tenth Circuit's lights, these statements do not implicate *Bruton* at all, simply because the prejudicial effect requires ***some*** degree of inferential thinking by the jury. The Fifth and Eleventh Circuits have taken the opposite view. Further review is plainly warranted.

B. The Question Presented Has Important and Recurring Implications For Innumerable Criminal Defendants Seeking To Protect Their Rights Under The Confrontation Clause

Joint trials, this Court has emphasized, "'play a vital role in the criminal justice system.'" *Zaifro* v. *United States*, 506 U.S. 534, 537 (1993) (quoting *Richardson* v. *Marsh*, 481 U.S. 200, 209 (1987)). And in such joint trials, incriminating statements "by one or more of the defendants are commonplace * * * since each [defendant] has reduced assurance that he will be protected by his own silence." *Marsh*, 481 U.S. at 209-10. As a result, *Bruton* challenges by defendants are routine. Indeed, *Bruton* challenges are among the most frequently litigated procedural claims in federal and state criminal practice.[2]

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[2] See, *e.g.*, *United States* v. *Lopez-Caceres*, 89 F. Supp. 2d 168, 171-72 (D. Puerto Rico 1998); *United States* v. *Rucker*, 32 F. Supp. 2d 545, 550 (E.D.N.Y. 1999); *United States* v. *Walters*, 188 F.R.D. 591, 600-01 (D. Kan.

How *Bruton* applies to various kinds of co-defendant statements is thus of crucial practical significance to the administration of justice. Co-defendant statements, after all, come in all shapes and sizes. Some (as here) name the defendant expressly. Some (again, as here) bear critically, if "only inferentially" (App., *infra*, 18a), on one or more elements of the crime. Co-defendant statements can, and often are, "powerfully incriminating" (*Bruton*, 391 U.S. at 128) without being facially tantamount to a full-blown confession. Whether, and to what extent, the rule in *Bruton* covers such statements is a recurring issue of the highest practical importance.

So, too, of course, are the underlying constitutional rights at stake. As this Court has explained, the Confrontation Clause right of cross-examination is of paramount importance and embodies a fundamental right guaranteed to the accused. "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the requirement or [right] of confrontation and cross-examination is an essential and fundamental right for the kind of fair trial which is this country's constitutional goal." *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965); accord *Berger* v. *California*, 393 U.S. 314, 315 (1969); *Barber* v. *Page*, 390 U.S. 719, 721 (1968); *Kirby* v. *United States*, 174 U.S. 47, 55-56 (1899).

In fact, this Court's cases "recognize that this truth-finding function of the Confrontation Clause is uniquely threatened

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1999); *United States* v. *Andreas*, 23 F. Supp. 2d 835, 844-45 (N.D. Ill. 1998); *United States* v. *Singh*, 973 F. Supp. 7, 14-15 (D. D.C. 1997); *Ortega* v. *United States*, 897 F. Supp. 771, 778-79 (S.D.N.Y. 1995); *United States* v. *Giampa*, 904 F. Supp. 235, 267-68 (D. N.J. 1995); *United States* v. *Washington*, 819 F. Supp. 358, 363 (D. Vt. 1993); *United States* v. *White*, 766 F. Supp. 873, 887-88 (E.D. Wa. 1991); *Davis* v. *State*, 528 S.E.2d 800 (Ga. 2000); *Gabow* v. *Commonwealth*, 34 S.W.2d 63 (Ky. 2000); *State* v. *Brewington*, 532 S.E.2d 496, 509-10 (N.C. 2000); *State* v. *Robertson*, 760 A.2d 82, 100 (Conn. 2000); *People* v. *Fletcher*, 13 Cal. 4th 451, 456 (1996); *State* v. *Tucker*, 861 P.2d 24, 28 (Hawaii App. 1993); *Foster* v. *United States*, 548 A.2d 1370, 1374 (D.C. App. 1988).

when an accomplice's [incriminating statements] are sought to be introduced against a criminal defendant without the benefit of cross-examination." *Lee* v. *Illinois*, 476 U.S. 530, 541 (1986); see also *Douglas* v. *State of Alabama*, 380 U.S. 415, 419 (1965) (conviction reversed because incriminating statement made by accomplice was read to the jury by the prosecutor and accomplice subsequently invoked his privilege against self-incrimination). Indeed, the *Bruton* decision itself "illustrates the extent of [this] Court's concern that the admission of this type of evidence will distort the truth-finding process." *Lee*, 476 U.S. at 542. The Tenth Circuit's decision relegates these concerns to a back seat, creating an artificial — and ultimately untenable — distinction between statements whose content incriminates "facially" and those whose content incriminates "only inferentially." In countless circumstances, as in this case, the inferentially incriminating statement by a non-testifying co-defendant can be every bit as damaging as the out-of-court statement that incriminates without regard to any other evidence in the case. The Court should grant review to provide guidance in this critical area of criminal procedure.

C. The Tenth Circuit's Decision is Wrong

The Tenth Circuit's conception of the rule in *Bruton* is fundamentally at odds with *Bruton* itself. The *Bruton* Court recognized that incriminating statements by a non-testifying co-defendant that "add[] substantial, perhaps even critical weight to the Government's case" necessarily implicate the Confrontation Clause. 391 U.S. at 128. Indeed, the *Bruton* Court concluded that the exclusion of the co-defendant's statement was justified if it posed merely a "'substantial threat[]'" to the defendant's confrontation rights by bolstering the government's proof. *Id.* at 137 (quoting *Jackson* v. *Denno*, 378 U.S. 368, 389 (1964)). By its terms, then, *Bruton* extends to incriminating statements by a co-defendant that do not amount to a "facially" complete confession of guilt by the defendant himself. Instead, the rule in *Bruton* covers even

those statements that substantially assist the government in proving the defendant's guilt on a key element of the offense, whether inferentially or directly. Yet the narrowing principle endorsed and applied by the Tenth Circuit ignores the full sweep of the *Bruton* decision. As a result, an important and recurring class of powerfully, if inferentially, incriminating statements will be exempted from the scrutiny that *Bruton* demands.

This case illustrates the consequences. Through the extra-judicial comment, the jury was permitted to hear Ardie say that Steve directed him to make the (allegedly misleading) phone calls, and that Ardie was reluctant to do so because of his distrust of his brother Steve. These devastating remarks — which, under *Bruton*, the jury must be presumed to have used against Steve — were a crucial, but completely improper, piece of proof relied upon by the government to satisfy its burden. The statements bolstered the credibility of a key government witness (Brad Russell) by confirming for the jury that it was Steve who had told Ardie to make the sales calls to customers in the first place. See, *e.g.*, *Bourjaily* v. *United States*, 483 U.S. 171, 179 (1987) (evidence gains probative force from surrounding evidence). As important, the statements cast a pall on Steve's reputation for trustworthiness in a case that hinged on whether the jury believed petitioner intended to run a legitimate enterprise or an unlawful scheme.

The introduction of Ardie's extra-judicial comment "added substantial, perhaps even critical weight to the Government's case in a form not subject to cross-examination." *Bruton*, 391 U.S. at 128. In substance, the government improperly used the *Bruton* statements to fill its evidentiary gap on the critical element of whether Steve had the requisite scienter for the charged offenses. It is difficult to see how Ardie's hearsay

statements could more "expressly implicate [] the defendant as his accomplice." *Marsh*, 481 U.S. at 208.[3]

The Tenth Circuit rested its narrow view of *Bruton* on this Court's most recent explication of the *Bruton* rule in *Gray* v. *Maryland*, 523 U.S. 185 (1998). But far from supporting the court of appeals' construction, this Court in *Gray* expressly cautioned that in applying *Bruton* "inference pure and simple cannot make the critical difference." 523 U.S. at 195. Rather, it is "***the kind of, not the simple fact of, inference***" that matters for *Bruton* purposes. *Id.* at 196 (emphasis added). As the Fifth Circuit has observed, *Gray* means that *Bruton* applies even when "the ***content*** of the statement is incriminating only if the jury draws certain ***inferences*** from it." *Lage*, 183 F.3d at 387 (emphasis added); See generally, Rosenberg, *supra*, at 528-29 (approving the Fifth Circuit's understanding of *Bruton*, as explicated in *Gray*).

The Tenth Circuit is wrong for another reason. By creating a dispositive distinction between inferentially and "facially" incriminating statements, the Tenth Circuit appears to have applied the functional equivalent of a harmless error analysis as a proxy for whether *Bruton* applies at all in the first instance. App., *infra*, 20a (concluding that the co-defendant's statements were not "'obviously important' to the government's case"). But this is putting the cart before the horse. A court should ask first whether the challenged statements "add[] substantial" weight to the government's case, *Bruton* (391 U.S. at 128), whether facially or by a closely linked inference. If so, *Bruton* applies. Only then should a court address whether, all things considered, the potential misuse of such evidence by the jury is

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[3] What is more, because the court below concluded that Ardie's statements did not implicate *Bruton* at all, it declined (App., *infra*, 20a n.4) to consider whether there was any cumulative effect of that error and a separate constitutional violation (the prosecutor's impermissible comment on petitioner's failure to testify, in violation of the rule in *Griffin* v. *California*, 380 U.S. 609 (1965)).

harmless beyond a reasonable doubt in light of all the evidence. See *Chapman* v. *California*, 386 U.S. 18 (1967) (harmless error analysis applies to *Bruton* violations); see also *Schneble* v. *Florida*, 405 U.S. 427 (1972) (same); *Harrington* v. *California*, 395 U.S. 250 (1969) (same). Such a traditional two-step approach — which is exactly the approach followed by the Fifth Circuit in *Lage* — does not disturb convictions that are supported by abundant evidence of guilt, while retaining the vitality of the protections afforded by the Confrontation Clause. See *Lage*, 183 F.3d at 387.

The *Bruton* error, standing alone, required a new trial for Steve Rahseparian. Because the Tenth Circuit erroneously held that the rule in *Bruton* was inapplicable in this case, it declined to engage in the appropriate harmless error analysis at all. Because a *Bruton* error is one of "constitutional dimension," it cannot be held harmless unless "the properly admitted evidence of guilt is so overwhelming and the prejudicial effect of the co-defendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." *Parker* v. *Randolph*, 442 U.S. 62, 70 (1979). No such conclusion can plausibly be drawn on this record.[4] The court of appeals' decision is clearly wrong and should be reversed.

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[4] Although Steve Rahseparian did, to be sure, order and ship merchandise used in the operation, there is no evidence that he ever spoke with (or misled) customers, and little evidence (nearly all of it from Brad Russell, a highly impeachable source) that he ever agreed or intended to defraud customers by failing to send out products or awards. Indeed, much of the evidence in the record shows that all three defendants intended to run a legitimate business; why Steve failed to send out relatively inexpensive promised goods (if indeed he did) is unexplained in the record. Without such evidence, the proof of Steve's scienter is insufficient. In no sense was the evidence against Steve Rahseparian "overwhelming."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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